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In The

SUPREME COURT of the UNITED STATES

October Term, 1969

No. 500

ARNOLD GROVER SCHMEAR, PETITIONER

v.

JOHN R. GAGNON, Warden
Wisconsin Correctional Institution

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ARNOLD GROVER SCHMEAR,

Petitioner

THE GILMAN PRESS, INC., MADISON, WISCONSIN

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Arnold Grover Schmear, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above-entitled case on May 27, 1968.

CITATIONS TO OPINIONS BELOW

The opinion of the U. S. District Court for the Western District of Wisconsin, printed in appendix B, infra, p. 2, is reported in 276 F. Supp. 4. The opinion of the U. S. Circuit Court of Appeals for the Seventh Circuit, printed in appendix B, infra, p. 6, will be reported in the Federal Reporter (citation presently unknown).

JURISDICTION

The judgment of the U. S. Circuit Court of Appeals for the Seventh Circuit was entered on May 27, 1968. On June 28, 1968, the Circuit Court of Appeals extended the time for filing a petition for rehearing to and including July 19, 1968. Pursuant to such extension, a petition for rehearing was timely filed. The petition was denied on August 13, 1968. The jurisdiction of the U. S. Supreme Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether petitioner was denied his constitutional rights under the Fourth and Fourteenth Amendments when he was arrested pursuant to a warrant issued by a district attorney and evidence seized pursuant to such arrest was introduced into evidence at his trial.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments IV and XIV.

STATEMENT

On July 26, 1967, petition for a writ of habeas corpus was filed in the U. S. District Court for the Western District of Wisconsin. The petitioner contended that his arrest warrant was constitutionally defective because it had been executed by a district attorney and not by a neutral

and detached magistrate. The petitioner also contended that evidence seized pursuant to the invalid arrest should not have been introduced at his trial. The arrest occurred in November, 1963 and the trial was held in August, 1964.

The U. S. District Court determined that the petitioner had exhausted the remedies available in the Courts of the State of Wisconsin as required by 28 U. S. C. 2254. A response to the petition was filed and oral argument was had to the U. S. District Court, the Hon. James E. Doyle presiding.

On November 7, 1967, the District Court entered its order granting the writ. Execution of the writ was stayed for 30 days to allow the respondent time in which to file a notice of appeal. An appeal was timely made to the U. S. Circuit Court of Appeals for the Seventh Circuit. The petitioner is presently at liberty on bail.

Briefs were filed and argument heard before the U. S. Circuit Court. On May 27, 1968, the U. S. Circuit Court entered its judgment reversing the judgment of the U. S. District Court. On June 28, 1968, the Circuit Court of Appeals extended the time for filing a petition for rehearing to and including July 19, 1968. Pursuant to such extension, a petition for rehearing was timely filed. The petition was denied on August 13, 1968.

REASONS FOR GRANTING THE WRIT

In 1963 the petitioner was arrested pursuant to an arrest warrant issued by a district attorney. Evidence seized at the time of the arrest was introduced at the trial. The Wisconsin Court later determined that petitioner's failure to object to the introduction of this evidence was not a strategic maneuver. (See decision of U. S. District Court, Appendix B, infra, p. 3-b).

Following his conviction, the petitioner petitioned the Wisconsin Supreme Court for a writ of habeas corpus. The petitioner contended that the evidence seized pursuant to the arrest warrant was inadmissible at trial because the arrest had been invalid. *State ex rel. Schmear v. Gagnon* (1967) 35 Wis. (2d) 447, 151 N. W. (2d) 20. (See decision of state court, Appendix B, infra, p. 19-b.) The petition was denied. The denial was based on the state court's refusal to hold that the petitioner's rights under the Fourth and Fourteenth Amendments had been violated. In so holding, the Wisconsin Supreme Court refused to apply its previous ruling in *State ex rel. White v. Simpson* (1965), 28 Wis. (2d) 590, 137 N. W. (2d) 391, to the petitioners case. (See decision of state court, Appendix B, infra, p. 12-b.)

The U. S. Circuit Court of Appeals for the Seventh Circuit, on the appeal from the U. S. District Court, adhered to the ruling set forth in *State ex rel. Schmear v. Gagnon* (1967), 35 Wis. (2d) 447, 151 N. W. (2d) 20. (See decision of U. S. Court of Appeals, Appendix B, infra, p. 8-b.) Thus, the Circuit Court of Appeals ruled that the petitioner had not been denied his constitutional rights when evidence seized pursuant to an invalid arrest was introduced at the trial.

The U. S. Supreme Court has determined that arrest warrants are to be issued by neutral and detached magistrates. *Giordenello v. United States* (1958), 357 U. S. 480, 78 Sup. Ct. 1245; *Johnson v. United States* (1948), 333 U. S. 10, 68 Sup. Ct. 367. A district attorney is not a neutral and detached magistrate. *Mancusi v. De Forte* (1968), — U. S. —, 88 Sup. Ct. 2120, *United States v. Katz* (1967), 389 U. S. 347, 88 Sup. Ct. 507, *Giordenello v. United States* (1958), 357 U. S. 480, Sup. Ct. 1245.

The issuance of the petitioner's arrest warrant was clearly a violation of the Fourth and Fourteenth Amendments as previously interpreted by the U. S. Supreme Court. *Giordenello v. United States* (1958), 357 U. S. 480, 78 Sup. Ct. 1245; *Johnson v. United States* (1948), 333 U. S. 10, 68 Sup. Ct. 367. When the petitioner was arrested his then existing constitutional rights were violated, and, the evidence seized pursuant to the arrest should have been excluded. *Ker v. California* (1963), 374 U. S. 23, 83 Sup. Ct. 1623; *Mapp v. Ohio* (1961), 367 U. S. 643, 81 Sup. Ct. 1684. Thus, the U. S. Circuit Court of Appeals for the Seventh Circuit erred when it held that the petitioner's constitutional rights had not been violated.

A determination as to whether the U. S. Circuit Court of Appeals erred when it ruled that petitioner's constitutional rights had not been violated is clearly in the public interest. A decision by this Court is required in order to settle vital questions of due process arising as the result of previous U. S. Supreme Court rulings. The public interest further requires that this Court resolve the all important question as to the application of its rulings in the

Johnson case and the *Giordenello* case to proceedings in the state courts of Wisconsin.

CONCLUSION

For the foregoing reasons the petitioner respectfully submits that this petition for a writ of certiorari be granted.

Respectfully submitted,

ARNOLD GROVER SCHMEAR

Petitioner

AMENDMENTS TO THE UNITED STATES CONSTITUTION

CONSTITUTION

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [XIV]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

APPENDIX
1-b

IN THE UNITED STATES DISTRICT COURT FOR
WESTERN DISTRICT OF WISCONSIN

OPINION OF DISTRICT COURT
(Formal Parts Omitted)

This is a petition for a writ of habeas corpus in which petitioner, an inmate of a Wisconsin correctional institution, claims that he is held in custody in violation of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

On August 31, 1964, petitioner was convicted of the crime of rape in violation of § 944.01, Wis. Stats. He was sentenced to an indeterminate term of not more than ten years. Upon direct appeal, the conviction was affirmed by the Wisconsin Supreme Court on June 25, 1965, in *State v. Schmear,* 28 Wis. 2d 126, 135 N. W. 2d 842. A petition for a writ of habeas corpus was denied by the Wisconsin Supreme Court on November 17, 1965.

On December 8, 1965, a second petition for habeas corpus was filed in the Wisconsin Supreme Court on the ground that evidence seized pursuant to an arrest based upon a warrant issued by a district attorney was inadmissible at trial because the warrant was improperly issued. Substantially the same question is presently raised here.

On August 19, 1966, the Wisconsin Supreme Court referred the matter to the Circuit Court for Jefferson County to hear, try and determine the issues of fact raised by the pleadings. A full evidentiary hearing was conducted be-

fore the Honorable Henry G. Gergen, Jr., on September 26, 1966. On December 13, 1966, Judge Gergen executed and reported certain findings of fact.

On June 6, 1967, the Wisconsin Supreme Court, in an opinion published at 35 Wis. 2d 447, 151 N. W. 2d 21, denied petitioner's second habeas corpus application.

It therefore appears, and I find, that petitioner has exhausted the remedies available in the courts of the State of Wisconsin as required by Title 28, U. S. C. § 2254.

In his *pro se* petition to this court, filed July 26, 1967, petitioner claims that evidence obtained pursuant to an invalid arrest warrant was admitted at his trial, and that the arrest warrant was constitutionally defective because it was executed by the district attorney and not by a neutral and detached magistrate.

Leave was granted to file the petition *in forma pauperis,* respondent was directed to respond to the said petition, and a response was filed. Paul R. Nesson, Esq., of Madison, Wisconsin, was appointed by this court as attorney to represent petitioner. The court expresses its appreciation to Mr. Nesson, who has given his time and effort without compensation.

The parties have agreed that no further evidentiary hearing is needed. The cause has been submitted on the pleadings, the transcript of the Wisconsin state court proceedings and the exhibits received therein, and on the briefs and oral argument.

From an examination of the entire record it appears that petitioner did receive a full and fair hearing before Judge Gergen in the state proceeding and that the state court has reliably found the relevant facts. Under the authority of *Townsend v. Sain*, 372 U. S. 293, 318 (1963), this court may defer to the state court's findings of fact. Under Title 28, U. S. C. § 2254(d), unless some defect in the state court hearing or findings of fact is established or otherwise appears, the state court findings of fact shall be presumed to be correct. It has not been alleged, nor has it otherwise appeared, that there exists any defect in the state court hearing and subsequent findings of fact. Those findings of fact are hereby presumed to be correct. In pertinent part, they are:

(1) Petitioner was arrested upon a warrant charging forcible rape issued by the District Attorney of Jefferson County.

(2) Pursuant to this arrest petitioner's T-shirt, trousers, yellow shirt and shorts were seized and transmitted to the state crime laboratory for examination.

(3) A criminologist employed by the state crime laboratory testified at trial with respect to her laboratory examinations of the clothing. She testified that she was able to identify stains on the clothing as blood and semen stains.

(4) The failure to object on search and seizure grounds was not a strategic maneuver, but rather was based upon the conclusion of the petitioner's attorney that he did not have a chance to prevail on such a motion.

(5) Petitioner was thereafter convicted and committed to the Wisconsin State Prison for a period of ten years.

Respondent has conceded at oral argument that if it was error to receive in evidence at the trial the clothing obtained pursuant to the execution of the arrest warrant, the error was not harmless.

> "Although the district judge may, where the state court has reliably found the relevant facts, defer to the state court's findings of fact, he may not defer to its findings of law. It is the district judge's duty to apply the applicable federal law to the state court fact findings independently." *Townsend v. Sain,* 372 U. S. 293, 318 (1963).

Deferring to the state court's findings of fact, and applying the applicable federal law independently, I hold petitioner was arrested upon a warrant of arrest which was invalid because it was issued by a district attorney and not by a neutral and detached magistrate.

The Fourth Amendment to the United States Constitution reads:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The guaranties of the Fourth Amendment apply to the states through the due process clause of the Fourteenth

Amendment. *Mapp v. Ohio,* 367 U. S. 643, 655 (1961). These guaranties apply to arrest warrants as well as search warrants. *Wong Sun v. United States,* 371 U. S. 471, 481 (1963); *Giordenello v. United States,* 357 U. S. 480, 485-486 (1968).

In *Johnson v. United States,* 333 U. S. 10 (1948), at pages 13 and 14, the United States Supreme Court declared:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
>
> . . .
>
> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."

It is the conclusion of this court that a district attorney is not a judicial officer, nor is he the equivalent of a "neutral and detached magistrate." I join with the sentiment expressed by the Wisconsin Supreme Court in its opinion in *State ex rel. White v. Simpson,* 28 Wis. 2d 590, 137 N. W. 2d 391 (1965), when it stated at page 598:

> "We recognize that the district attorney holds an office of great dignity and that in some respects he has quasi-judicial responsibilities. His decision to initiate

prosecution or to refuse to do so is, in a sense, a judicial determination.

. . .

"It is one thing to acknowledge that a district attorney is capable of making quasi-judicial judgments; it is a vastly different thing to assert that as a government enforcement agent he can qualify as the neutral, deliberate, and impartial magistrate who is authorized to determine probable cause under the Fourth amendment within its meaning and spirit as interpreted by the United States supreme court.

. . .

"In our opinion, the determination of the district attorney does not constitute the determination of a neutral and detached magistrate, as required in *Johnson v. United States* (1948) . . ."

Confirming the principle in *Johnson v. United States, supra,* the United States Supreme Court recently stated its view of the critical nature of the function of the magistrate:

"Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his 'neutral and detached' function and not serve merely as a rubber stamp for the police." *Aguilar v. Texas,* 378 U. S. 108, 111 (1964).

See also *Giordenello v. United States, supra* at 486. *Schmerber v. California,* 384 U. S. 757, 770 (1966), emphasizes "the importance of informed, detached and deliberate

determinations of the issue" by a " 'neutral and detached magistrate' ".

The warrant for this petitioner's arrest, therefore, was invalid because it was not issued by a magistrate. The seizure of certain evidence, pursuant to the arrest based on the invalid warrant, was improper. The receipt of this evidence at the trial was error and it was prejudicial. Petitioner's conviction, therefore, was obtained in violation of the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The petition for a writ of habeas corpus is granted, and the petitioner will be ordered discharged from custody under the present judgment of conviction. Execution of the order will be stayed for a period of thirty days, however, to afford the respondent opportunity to appeal from this ruling.

An order consistent with the foregoing will be entered.

Dated this 9th day of November, 1967.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

DECISION AND JUDGMENT
(Formal Parts Omitted)

Before DUFFY, *Senior Circuit Judge,* KILEY and SWYGERT, *Circuit Judges.*

DUFFY, *Senior Circuit Judge.* Appellee Schmear (petitioner) was arrested on November 9, 1963, on a warrant issued by the district attorney of Jefferson County, Wisconsin. The warrant was issued pursuant to Section 954.01 and 954.02 (3) and (5), Wisconsin Statutes 1963.[1] The crime charged was forcible rape.

At the time of the arrest, certain clothing of appellee was seized and was sent to the Wisconsin State Crime Laboratory for examination. At the trial, no objection was made to the receipt of the clothing into evidence and to the testimony of the State Crime Laboratory technician on the ground of illegal search and seizure. Objections were made on other grounds and these objections were overruled.

Appellee's conviction was affirmed by the Wisconsin Supreme Court on June 25, 1965. *State v. Schmear,* 28 Wis. 2d 126, 135 N. W. 2d 842. Thereafter, on November 2, 1965, the Wisconsin Supreme Court held that district attorneys were not competent to issue warrants of arrest.

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[1]Sec. 954.01 provides: "For the arrest of persons accused of crime, the judges of courts of record, court commissioners, justices of the peace, district attorneys . . . are authorized to issue process."

The officials mentioned in Sec. 954.01 (except district attorneys) are referred to generally in Chapters 954 to 963 as magistrates.

State ex rel. White v. Simpson, 28 Wis. 2d 590, 597-8, 137 N. W. 2d 391. The decision was based on federal constitutional grounds. In *State v. Raskin,* 30 Wis. 2d 39, 55, 139 N. W. 2d 667 (1966), the Wisconsin Supreme Court refused to apply *White* retroactively.

Thereafter, appellee brought habeas corpus proceedings in the Wisconsin Supreme Court. The basis of his petition was that the district attorney's warrant in his case was invalid and therefore, the seizure of his clothing and evidence based thereon was illegal and should have been excluded at his trial.

However, the Wisconsin Supreme Court declined to apply the rule of rule of *State ex rel. White v. Simpson, supra,* retroactively and suppress the evidence. Therefore, the Court denied the issuance of the writ. *State ex rel. Schmear v. Gagnon,* 35 Wis. 2d 447, 151 N. W. 2d 20 (1967). The United States Supreme Court has never expressly held that district attorneys are incompetent to issue warrants.

In the proceeding now before us, the District Court held that appellee's arrest was illegal because the warrant was not issued by a magistrate and, therefore, the evidence seized pursuant to the arrest, was inadmissible and in violation of due process of law under the Fourteenth Amendment. The Court's opinion did not deal with the question of retroactive application of *State ex rel. White v. Simpson, supra.* However, the effect of the District Court's opinion is to apply *White* retroactively since the trial of this case preceded *White.* The appellee urges here that the *White* decision must be given retroactive ap-

plication, and therefore, the evidence seized as an incident to the arrest, must be suppressed.

Petitioner argues that the United States Supreme Court has interpreted the Fourth Amendment as requiring issuance of warrants solely by neutral and detached magistrates. *Johnson v. United States,* 333 U. S. 10, 14 (1948); *Giordenello v. United States,* 357 U. S. 480, 485-6 (1958); *Aguilar v. Texas,* 378 U. S. 108, 112-13 (1964). In *Giordenello,* the Court emphasized that the language of the Fourth Amendment applies to arrest as well as to search warrants.

In *Raskin, supra,* the Wisconsin Supreme Court refused to apply the rule of *White* retroactively for several reasons: 1) The United States Supreme Court has not held that district attorneys are incompetent to issue warrants; 2) The Court did not wish to release at this late date many hundreds of defendants who have been tried and convicted under a procedure specifically authorized by the Wisconsin Statutes, and 3) The fact-finding or truth determining process at those trials which had been completed was not endangered because a district attorney issued the arrest warrant. This, of course, is a much different situation than where a defendant's confession has been coerced or where he has been denied the right to counsel at trial. See *Jackson v. Dnno,* 378 U. S. 368 (1964) and *Gideon v. Wainwright,* 372 U. S. 335 (1963).

We have excellent authority for not applying the rule of *State ex rel. White v. Simpson, supra,* retroactively.

On a number of occasions, the United States Supreme Court has refused to apply new criminal rules or decisions

retroactively when the integrity of the fact-finding process of the trial has been safe-guarded. In *Linkletter v. Walker,* 381 U. S. 618 (1965), the Court refused to apply the exclusionary rule of *Mapp v. Ohio,* 367 U. S. 643 (1961) retroactively. In *Tehan v. Shott,* 382 U. S. 406 (1966), the Court held that the rule of *Griffin v. California,* 380 U. S. 609 (1965) would not be applied retroactively. *Griffin* held that the prosecution cannot comment on the defendant's failure to testify on his own behalf in a criminal trial because such comment violates the defendant's privilege against self-incrimination. In *Johnson et al. v. New Jersey,* 384 U. S. 719 (1966), the Court held that the rule of *Escobedo v. Illinois,* 378 U. S. 478 (1964) and *Miranda v. Arizona,* 384 U. S. 436 (1966) would not be applied retroactively. If the important legal principles of these cases were not applied retroactively, we feel we should apply the *White v. Simpson* doctrine prospectively only.

We think the Wisconsin Supreme Court was rightly concerned that retroactive application of *State ex rel. White v. Simpson, supra,* would open to attack hundreds and possibly thousands of state criminal convictions. In a great many of these cases, the injured victims and important witnesses are dead, and a new trial would be impracticable.

The judgment of the District Court granting the petition of Arnold Grove Schmear for a writ of habeas corpus is

REVERSED.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

In the Supreme Court for the State of Wisconsin

State ex rel. White v. Simpson (1965), 28 Wis. (2d) 590, 137 N. W. (2d) 391.

DECISION AND JUDGMENT
(Formal Parts Omitted)

APPEAL from an order of the county court of Milwaukee county: WILLIAM R. MOSER, Judge. *Reversed.*

Pursuant to sec. 52.25, Stats., Willie Lee White signed under oath a paternity complaint on March 30, 1965, naming pursuant to sec. 52.25, a warrant for the arrest of the defendant was executed by the deputy clerk of the county court of Milwaukee county, based on an "Authorization for Paternity Action" issued by the assistant corporation counsel.

On April 2, 1965, the defendant was served with a copy of the complaint and was brought before the county

court to answer the charge. At that time the court appointed a guardian *ad litem* for the defendant, and the guardian *ad litem* entered a special appearance.

He objected to the jurisdiction of the court on the grounds that the complaint did not state sufficient facts for the issuance of a warrant and also that the manner in which the warrant was issued was in violation of the constitutional rights of the defendant. The trial court denied the motion of the defendant and ordered the defendant either to admit or deny the allegations of the complaint. The defendant entered a denial.

The defendant concedes in this matter that the statutes relative to paternity proceedings, secs. 52.21 through 52.45, Stats., have been followed. He appeals from the order denying his motion to dismiss.

Constitutional Provisions Involved

Fourth amendment, United States constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shal lissue, but upon probable cause, supported by Oath or affirmation; and particularly describing the place to be searched, and the persons or things to be seized."

Sec. 11, art. I, Wisconsin constitution:

"The right of the people to be secure in their persons, houses, papers, and effects against unreasonable

searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

* * *

"We are in bondage to the law in order that we may be free."

—Cicero,
Pro Cluentio 53

In a significant series of cases, the United States supreme court has made it unmistakably clear that warrants for search or for arrest must meet certain minimum standards under the Fourth amendment to the United States constitution. *Jaben v. United States* (1965), 381 U. S. 214, 85 Sup. Ct. 1365, 14 L. Ed. (2d) 345; *United States v. Ventresca* (1965), 380 U. S. 102, 85 Sup. Ct. 741, 13 L. Ed. (2d) 684; *Aguilar v. Texas* (1964), 378 U. S. 108, 84 Sup. Ct. 1509, 12 L. Ed. (2d) 723; *Giordenello v. United States* (1958), 357 U. S. 480, 78 Sup. Ct. 1245, 2 L. Ed. (2d) 1503; *Johnson v. United States* (1948), 333 U. S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436; *Nathanson v. United States* (1933), 290 U. S. 41, 54 Sup. Ct. 11, 78 L. Ed. 159.

The guaranties of the Fourth amendment are enforceable against the states through the due-process clause of the Fourteenth amendment. *Ker v. California* (1963), 374 U. S. 23, 30, 83 Sup. Ct. 1623, 10 L. Ed. (2d) 726; *Mapp v. Ohio* (1961), 367 U. S. 643, 655, 81 Sup. Ct. 1684, 6 L. Ed. (2d) 1081; *Browne v. State* (1964), 24 Wis. (2d) 491, 502, 129 N. W. (2d) 175, 131 N. W. (2d) 169. These guaranties apply to warrants of arrest as well as to search warrants. *Wong Sun v. United States* (1963), 371 U. S. 471, 481, 83 Sup. Ct. 407, 9 L. Ed. (2d) 441; *Giordenello v. United States, supra,* at page 485.

As a result of the United States supreme court cases, it is constitutionally essential that the magistrate be mindful of the underlying circumstances before he authorizes the issuance of a warrant. The magistrate may not accept without question the suspicions or conclusions of a complainant but, on the contrary, must determine the existence of probable cause after being apprised of the relevant facts. In performing this function, the magistrate or court commissioner serves as a judicial officer and must act in a neutral and detached manner. He must receive an adequate answer to this hypothetical question: "What makes you think that the defendant committed the offense charged?" *Jaben v. United States* (1965), 381 U. S. 214, 224, 85 Sup. Ct. 1365, 14 L. Ed. (2d) 345.

The underlying facts need not be derived solely from the written complaint. Nevertheless, upon review it must appear that sufficient facts were brought to the magistrate's attention even though they are not contained in the writ-

ten complaint. In the *Jaben Case,* at page 224, Mr. Justice Harlan stated that what was required was

> ". . . that enough information be presented to the Commissioner to enable him to make the judgment that the charges are not capricious and are sufficiently supported to justify bringing into play the further steps of the criminal process."

In *Giordenello v. United States* (1958), 357 U. S. 480, 486, 78 Sup. Ct. 1245, 2 L. Ed. (2d) 1503, the rule was framed as follows:

> "The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime."

In *Aguilar v. Texas* (1964), 378 U. S. 108, 112, 84 Sup. Ct. 1509, 12 L. Ed. (2d) 723, the court stated that *Giordenello* did not depend upon a requirement of the Federal Rules of Criminal Procedure but rather was based upon constitutional requirements of probable cause as expressed in the Fourth amendment.

We have scrutinized the manner in which the warrant in the instant case was issued. The respondent has urged that the relevant constitutional requirements do not apply to civil actions. Two basic challenges are made by the appellant. It is claimed, first, that the complaint is insufficient to show the presence of probable cause and, secondly, that

the corporation counsel is not a disinterested, neutral officer who is entitled to issue a warrant.

* * *

3. *The District Attorney as Magistrate.*

In the case at bar, the arrest warrant was authorized by an assistant corporation counsel. This is authorized by secs. 52.22 and 52.25, Stats. As to counties having a population of over 500,000, the former section of the statutes imposes upon the corporation counsel or his assistants the powers and duties conferred upon the district attorney.

We must determine whether a district attorney is the equivalent of a neutral and detached magistrate who may constitutionally be empowered to authorize the issuance of the warrant. Our conclusion is that he is not. In *Johnson v. United States* (1948), 333 U. S. 10, 13, 68 Sup. Ct. 367, 92 L. Ed. 436, Mr. Justice JACKSON, speaking for the court, commented as follows:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime."

The effect of this rule is to interpose the impartial judgment of a judicial officer between the citizen and the police and also between the citizen and the prosecutor, so

that an individual may be secure from an improper search or an improper arrest.

We recognize that the district attorneys holds an office of great dignity and that in some respects he has quasi-judicial responsibilities. His decision to initiate prosecution or to refuse to do so is, in a sense, a judicial determination. See *O'Neil v. State* (1926), 189 Wis. 259, 261, 207 N. W. 280. He is a "sworn minister of justice." *State v. Russell* (1892), 83 Wis. 330, 338, 53 N. W. 441.

It is one thing to acknowledge that a district attorney is capable of making quasi-judicial judgments; it is a vastly different thing to assert that as a government enforcement agent he can qualify as the neutral, deliberate, and impartial magistrate who is authorized to determine probable cause under the Fourth amendment within its meaning and spirit as interpreted by the United States supreme court.

The disqualification of the district attorney under the Fourth amendment is as necessary in a paternity proceeding under the Wisconsin statutes as in a criminal case. We note that the coperation counsel is obligated to prosecute the putative father if the mother of the illegitimate child fails to do so under sec. 52.23, Stats. In our opinion, the determination of the district attorney does not constitute the determination of a neutral and detached magistrate, as required in *Johnson v. United States* (1948), 333 U. S. 10, 14, 68 Sup. Ct. 367, 92 L. Ed. 436. It is only an impartial magistrate who can accomplish "the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy." *Jones v.*

United States (1958), 357 U. S. 493, 498, 78 Sup. Ct. 1253, 2 L. Ed. (2d) 1514.

With reference to the issuance of process, sec. 954.01 (2), Stats., provides that "district attorneys are not magistrates. . . ." However, under sec. 954.02 (4), a district attorney may initiate a prosecution by issuing a summons instead of a warrant. It is defensible to permit a corporation counsel or district attorney to issue a summons even though he may not issue a warrant, because a summons (unlike a warrant) does not authorize an arrest.

By the Court—Order reversed.

In the Supreme Court for the State of Wisconsin

State ex rel. Schmear v. Gagnon (1967), 35 Wis. (2d) 447, 151 N. W. (2d) 20.

DECISION AND JUDGMENT
(Formal Parts Omitted)

ORIGINAL PROCEEDING in this court: *Habeas Corpus. Denied.*

Petitioner Arnold Grover Schmear was convicted by a jury of rape (sec. 994.01, Stats.) on August 31, 1964, and sentenced to an indeterminate term of not more than ten years. His conviction was affirmed by this court.[2] In both matters, petitioner was represented by Attorney John B. Grogan. A petition for a writ of *habeas corpus* was denied by the court on November 17, 1965.

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[2]**State v. Schmear** (1965), 28 Wis. (2d) 126, 135 N. W. (2d) 842.

On December 8, 1965, the present petition for a writ of *habeas corpus* was brought before this court by petitioner. The attorney general filed a return to an order to show cause issued by this court on the petition. On August 19, 1966, fact finding was ordered, limited solely to "the admission in evidence of evidence seized as a result of the arrest alleged to be illegal. . . ." Findings of fact were made by the trial court after a hearing held on September 26, 1966. Petitioner moves this court for an order confirming the findings of the referee and for an order releasing the petitioner from custody. The attorney general also moves the court for an order confirming the findings and for an order dismissing the petition for *habeas corpus*.

The trial court made the following findings of fact:

1. Petitioner was arrested upon a warrant issued by the district attorney of Jefferson county.

2. Petitioner's T-shirt, trousers, yellow shirt and shorts were seized pursuant to this arrest and transmitted to the State Crime Laboratory for examination.

3. Prior to petitioner's trial a motion was made to suppress the evidenc seized. During the trial, petitioner's attorney filed a written motion to suppress the clothing and the results of the laboratory tests from the evidence. The essential grounds for these motions were that:

a. There was no evidence presented connecting the blood and semen specks on the clothing to the petitioner.

b. There was no evidence showing that the blood and semen specks stained the clothing of petitioner on the night of the alleged rape.

4. The clothes and the testimony of a criminologist identifying blood and semen specks on the clothing of petitioner were admitted into evidence.

5. Following petitioner's conviction and sentencing, petitioner's attorney moved for a new trial asserting that prejudicial error was committed in admitting the testimony of the criminologist and the clothing into evidence. No objection was made on search and seizure grounds.

6. The petitioner's attorney assumed the arrest was valid and the failure to object on search and seizure grounds was not a strategic maneuver .

* * *

WILKIE, J. One issue is raised by these proceedings: Is evidence seized pursuant to an arrest based upon a warrant issued by a district attorney inadmissible at trial because the arrest warrant was defective, where the authorization for the arrest warrant was made by the district attorney and trial was held before this court's decision in *State ex rel. White v. Simpson?*[3]

In *State ex rel. White v. Simpson* this court held that a district attorney was not a neutral and detached mag-

[3]1965, 28 Wis. (2d) 590, 137 N. W. (2d) 391.

istrate as required by *Johnson v. United States*[4] and that therefore he was not empowered to authorize the issuance of an arrest warrant.

In the case at bar the warrant for the arrest of the petitioner was issued by the district attorney and petitioner contends that the arrest is invalid. He contends that if the arrest is invalid, all evidence seized pursuant to that arrest is inadmissible at trial as "a fruit of the poisonous tree."[5] Petitioner's argument continues that if his clothing was seized pursuant to the allegedly defective arrest warrant, the clothing and the testimony of the criminologist as to the blood and semen stains on the clothing should have been excluded.[6]

To begin with, the arrest warrant was issued on November 9, 1963, and petitioner's trial was held in August, 1964. The date of the *White* decision, which declared arrest warrants issued by a district attorney invalid, was November 2, 1965. The action of the trial court in admitting the evidence in question was based upon an assumption that the arrest warrant was valid. Thus, the question in the case at bar is whether the *White* rule should be applied retroactively to declare the arrest warrant invalid, thereby rendering evidence seized pursuant to this arrest inadmissible.

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[4]**Johnson v. United States** (1948), 333 U. S. 10, 68 Sup. Ct. 367, 92 L. Ed. 436.

[5]**Nardone v. United States** (1939), 308 U. S. 338, 341, 60 Sup. Ct. 266, 84 L. Ed. 307; **Silverthorne Lumber Co. v. United States** (1920), 251 U. S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319.

[6]**Giordenello v. United States** (1958), 357 U. S. 480, 78 Sup. Ct. 1245, 2 L. Ed. (2d) 1503; **Johnson v. United States, supra,** footnote 3.

The case of *State ex rel. La Follette v. Raskin*[7] resolved the question of the retroactivity of the *White* rule. *State ex rel. La Follette v. Raskin* involved a challenge to the jurisdiction of the court over the defendant, who was arrested pursuant to a warrant issued by a deputy clerk of a county court. In that case this court thoroughly discussed the guidelines for retroactive application of a decision concerning rules of federal constitutional law. This court held that the *White* rule was not to be applied retroactively.

> "With respect to the rule in *White*, the basic purpose of the rule is to improve police practices and to assure that arrests will be made on a proper showing of probable cause as determined by an independent and impartial magistrate. This purpose is not served by applying the rule of *White* to cases that have been finalized, even though the defendant has preserved his attack on the validity of the arrest. In each such case the defendant has been arrested, brought before a magistrate, bound over after a finding of probable cause by an impartial magistrate (or waiver) arraigned, tried, convicted, and sentenced. The rule requiring probable cause as determined by an independent magistrate before arrest is aimed not so much at the protection of the innocent or at the preservation of the reliability of the prosecution as against the defendant, but primarily at the requirement of giving a defendant a fair trial."[8]

Retroactivity of a new rule of federal constitutional law is discussed by the United States supreme court in

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[7](1966), 30 Wis. (2d) 39, 139 N. W. (2d) 667.

[8]**State ex rel. La Follette v. Raskin, supra,** footnote 6, at page 54.

Johnson v. New Jersey.[9] That case held that retroactive application of a constitutional rule is confined to those cases where "the rule affected 'the very integrity of the fact-finding process' and averted 'the clear danger of convicting the innocent.' "[10] Other considerations in *Johnson* were the effect on the administration of criminal laws of a retroactive ruling and the protection of other constitutional rules partially embracing the scope of the new rule. Under these guidelines, the decision of this court in *Raskin*, in refusing to apply the *White* rule retroactively, was entirely correct. An arrest made pursuant to a warrant issued by a district attorney does not affect the integrity or reliability of the fact-finding process.

A further consideration against applying the *White* rule retroactively is that there may be hundreds of prisoners long in prison who have been convicted on evidence seized pursuant to an arrest warrant that did not meet *White* standards but which evidence was essentially reliable.

In a case closely analogous to the instant proceeding, the United States supreme court refused to apply the rule of *Mapp v. Ohio*[11] retroactively.[12] In *Mayo* the supreme court held that all evidence obtained by searches and seizures in violation of the federal constitution is inadmissible in a criminal trial in a state court. The *Mapp* rule

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[9](1966), 384 U. S. 719, 725, 726, 86 Sup. Ct. 1772, 16 L. Ed. (2d) 882.

[10]**Johnson v. New Jersey, supra,** footnote 8, at page 727. See **Linkletter v. Walker** (1965), 381 U. S. 618, 639, 85 Sup. Ct. 1731, 14 L. Ed. (2d) 601; **Tehan v. Shott** (1966), 382 U. S. 406, 416, 86 Sup. Ct. 459, 15 L. Ed. (2d) 453.

[11](1961), 367 U. S. 643, 81 Sup. Ct. 1684, 6 L. Ed. (2d) 1081.

[12]**Linkletter v. Walker, supra,** footnote 9.

was not applied retroactively because the rule affected evidence "the reliability and relevancy of which is not questioned."[13] The court also said that the purpose of *Mapp*, which was to deter lawless action of the police, would not be served by retroactive application of the rule, and the rule, which had no bearing on guilt, would seriously disrupt the administration of justice.

In this proceeding, petitioner is contending that the *White* rule should be applied retroactively to exclude evidence seized pusruant to an arrest made by a warrant issued by a district attorney. The reliability or relevancy of the seized evidence is not question, and we must conclude that the purpose of *White, i.e.*, to improve police practices, would not be furthered by excluding the evidence in the instant proceeding.

Petitioner contends that the *White* decision was merely an application of already existing federal law, so that *White* did not forge new constitutional concepts. Hence, an arrest made in violation of the standards set forth in *White* violated federal law even if made before *White*, and such an arrest was therefore invalid. Petitioner cites several cases which he claims made the holding in *White* self-evident.[14] However, all these cases stand for the proposition that "the inferences from the facts which lead to

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[13]Id. at page 639.

[14]**Henry v. United States** (1959), 361 U. S. 98, 80 Sup. Ct. 168, 4 L. Ed. (2d) 134; **Johnson v. United States, supra,** footnote 3; **Weeks v. United States** (1914), 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652; **Carroll v. United States** (1925), 267 U. S. 132, 45 Sup. Ct. 280, 69 L. Ed. 543; **Giordenello v. United States, supra,** footnote 5; **Aguilar v. Texas** (1964), 378 U. S. 108, 84 Sup. Ct. 1509, 12 L. Ed. (2d) 723.

the complaint '[must] be drawn by a neutral and detached magistrate instead ofbeing judged by the officer engaged in the often competitive enterprise of ferreting out crime.' "[15] The issue in *White*, not directly resolved by these rulings, was whether the district attorney was such a neutral and detached magistrate.

The ruling in *White* articulated and defined the concept of a neutral and detached magistrate to exclude a district attorney. No decision of the United States supreme court had expressly held district attorneys to be incompetent to issue warrants. In fact, the district attorney was considered to be a servant of the law[16] and a sworn minister of justice.[17] Further, the district attorney was expressly authorized to issue warrants of arerst by sec. 954.02 (3), (5), Stats. Bearing in mind these considerations, the *White* decision was certainly not self-evident.

By the Court.—Issuance of writ of *habeas corpus* denied.

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[15]**Aguilar v. Texas, supra,** footnote 13, at page 112.

[16]**Singer v. United States** (1965), 380 U. S. 24, 37, 85 Sup. Ct. 783, 13 L. Ed. (2d) 630.

[17]**State ex rel. Sauk County District Attorney v. Gollmar** (1966), 32 Wis. (2d) 406, 413, 145 N. W. (2d) 670.

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In The

SUPREME COURT of the UNITED STATES

October Term, 1968

No. 500

ARNOLD GROVER SCHMEAR,

Petitioner,

v.

JOHN R. GAGNON, Warden
Wisconsin Correctional Institution,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In The

SUPREME COURT of the UNITED STATES

October Term, 1968

No. .....

ARNOLD GROVER SCHMEAR,

Petitioner,

v.

JOHN R. GAGNON, Warden
Wisconsin Correctional Institution,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JURISDICTION

Respondent opposes the granting of a writ of certiorari on the ground that the facts of this case do not present any substantial federal question in connection with the admission in evidence of articles seized from petitioner incidental to his arrest.

STATEMENT OF FACTS

There is no dispute about the facts. They were stipulated in the state court (R. 48) and the stipulated findings appear at R. 49-52.

Petitioner was arrested on a warrant charging forcible rape issued by the district attorney of Jefferson county, Wisconsin, on November 9, 1963 pursuant to secs. 954.01 and 954.02 (3) and (5), Wis. Stats. 1963. Pursuant to the arrest certain clothing of petitioner was seized and sent to the Wisconsin state crime laboratory for examination. After one mistrial, petitioner was again tried commencing August 12, 1964. No objection to the introduction of the clothing in evidence and the testimony of the state crime laboratory technician was made on the ground of illegal search and seizure because the defense attorney did not believe that he could prevail on that ground. He did, however, object on other grounds which were overruled, and renewed his objection, after conviction, in his motion for new trial. He was of the opinion that the question of the admissibility of the evidence was crucial (R. 66). Respondent makes no claim that the admission of the evidence was harmless error.

On June 25, 1965, petitioner's conviction was affirmed by the Wisconsin Supreme Court. *State v. Schmear*, 28 Wis. 2d 126, 135 N. W. 2d 842.

On November 2, 1965, the Wisconsin Supreme Court held that district attorneys were not competent to issue warrants of arrest, on federal constitutional grounds. *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 597-598, 137 N. W. 2d 391.

Thereafter, petitioner brought habeas corpus proceedings in the Wisconsin Supreme Court on the ground that his arrest based on a district attorney's warrant was invalid and therefore the seizure of his clothing and evidence based thereon was illegal and the evidence should have been excluded at the trial. The Wisconsin Supreme Court declined to apply the rule of *State ex rel. White v. Simpson, supra,* retroactively and denied issuance of the writ. *State ex rel. Schmear v. Gagnon,* (1967) 35 Wis. 2d 447, 151 N. W. 2d 20.

In this federal habeas corpus proceeding the district court has held that the petitioner's arrest was illegal because the warrant was not issued by a magistrate and therefore the evidence seized pursuant to the arrest was inadmissible and was prejudicial, in violation of due process of law under the Fourteenth Amendment. The opinion does not deal with the question of retroactive application of *State ex rel. White v. Simpson,* (1965) 28 Wis. 2d 590, 137 N. W. 2d 391. The Court of Appeals reversed on the ground that the rule of *State ex rel. White v. Simpson* should not be applied retroactively, agreeing with the position of the Wisconsin Supreme Court in that respect.

ARGUMENT

I. NOTHING IN THE FOURTH AMENDMENT DISQUALIFIES PROSECUTING ATTORNEYS FROM MAKING FINDINGS OF PROBABLE CAUSE AND ISSUING WARRANTS OF ARREST.

The Fourth Amendment provides:

> "ARTICLE IV.
>
> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Amendment is silent about who is to issue warrants. The word "magistrate" does not appear in the Amendment. The United States Supreme Court decisions relied upon below by petitioner all involved the question whether the determination of probable cause was to be made by a *policeman or other enforcement officer,* or "a neutral and detached magistrate." Stress is placed upon the fact that the former are "engaged in the often competitive enterprise of ferreting out crime."

> See, e.g., *Johnson v. United States,* (1948) 333 U. S. 10, 14, 68 S. Ct. 367, 369, 92 L. ed. 369, 436;
>
> *Giordenello v. United States,* (1958) 357 U. S. 480, 486, 78 S. Ct. 1245, 1250, 2 L. ed. 2d 1503, 1509;
>
> *Jaben v. United States,* (1965) 381 U. S. 214, 85 S. Ct. 1365, 14 L. ed. 2d 345.

The district attorney, however, is in a different situation entirely. As is well known, in practice, he is the one who calls the shots, determining whether a suspect shall be charged and if so with what offense, applying to his determination of that question a higher standard of proof than that required to establish probable cause for an arrest. He is the one who will have to prosecute the case, and he tends to view the proof from the point of view of whether it will establish guilt beyond a reasonable doubt.

In the federal system, his all-powerful position in the charging process is illustrated by the recent decision of the United States Court of Appeals for the District of Columbia Circuit in *Newman v. United States*, (1967) 382 F. 2d 479. In Wisconsin, the district attorney does not, at least in theory, enjoy quite the same omnipotence. A magistrate may, but usually will not, issue a warrant on a complaint not approved by the district attorney. Moreover, if the district attorney determines not to file an information against a person bound over for trial on a felony charge, section 955.17 (2), Wisconsin Statutes, requires the district attorney to file a statement of his reasons, but the court or presiding judge may disagree and require an information to be filed.

As an attorney at law, the district attorney is, of course, an officer of the court. He is a sworn minister of justice.

State v. Russell, (1892) 83 Wis. 330, 338, 53 N. W. 441;

State ex rel. Sauk County District Attorney v. Gollmar, (1966) 32 Wis. 2d 406, 413, 145 N. W. 2d 670.

As to United States Attorneys, this Court has recently stated:

> "* * * the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a 'servant of the law' with a 'twofold aim . . . that guilt shall not escape or innocence suffer' * * *." *Singer v. United States,* (1965) 380 U. S. 24, 36, 85 S. Ct. 783, 13 L. ed. 2d 630, 638-639.

It is anomalous that the advice of a "neutral and detached magistrate" (whose finding of probable cause is said to be necessary to the issuance of a valid warrant) *is not,* as such, a defense to a suit for malicious prosecution, while that of the district attorney (said now to be incompetent to find probable cause and issue warrants) *is* a defense.

54 C. J. S. 1012-1014—Malicious Prosecution § 48;

Sutton v. McConnell, (1879) 46 Wis. 269, 50 N. W. 414;

Lueck v. Heisler, (1894) 87 Wis. 644, 650, 58 N. W. 1101.

As to reliance upon the advice of the prosecuting attorney, see Anno. 10 A. L. R. 2d 1215.

Finally, prosecuting officers have been held immune from liability under the Civil Rights Act on the ground that they are judicial or quasi-judicial officers and partake of the same immunity as judges. Many cases so holding are collected in the recent case of *Bauers v. Heisel,* (3rd

Circ. 1966) 361 F. 2d 581, 586-587, note 7, cert. den. (1967) 386 U. S. 1021. In so holding with regard to a New Jersey county prosecutor, the court stated at 361 F. 2d 589-590:

> "In deciding the question of whether a prosecuting attorney is liable for acts done in his official capacity, we must decide whether his duties are sufficiently judicial as to cloak him with the same immunity afforded judges or are so closely related to those duties of law enforcement officials as to amerce him with potential civil liability for his imprudent actions. See Monroe v. Pape, 365 U. S. 167, 81 S. Ct. 473, 5 L. Ed. 492 (1961); Comment, 18 Ark. L. Rev. 81, 84-92 (1964). Analogy could support either conclusion, but we believe that both reason and precedent require that a prosecuting attorney should be granted the same immunity as is afforded members of the judiciary. The reasons are clear: his primary responsibility is essentially judicial—the prosecution of the guilty and the protection of the innocent, Griffin v. United States, 295 F. 437, 439-440 (C. A. 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest. In this respect, it is imperative that he enjoy the same freedom and independence of action as that which is accorded members of the bench. This reasoning is nearly as well established in Anglo-American law as judicial immunity itself. Yaselli v. Goff, 12 F. 2d 396 (C. A. 2, 1926), aff'd, per curiam 'on the authority of Bradley v. Fisher * * * [and] Alzua v. Johnson, 231 U. S. 106, 111 [34 S. Ct. 27, 58 L. Ed. 142],' 275 U. S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927), and numerous cases and authorities cited therein. Prosecuting attorneys who have been sued under the Civil Rights Act, R. S. § 1979, have likewise been held immune. Laughlin v. Rosenman, 82 U. S. App. D. C. 164, 163

F. 2d 838 (1947); Kenney v. Fox, supra, and other cases cited in note 7, supra."

Therefore, to equate the district attorney (a judicial or quasi-judicial officer, learned in the law, a sworn minister of justice) who as a practical matter is the officer who determines whether or not a charge will be brought, with police officers, sheriffs and other enforcement officers (usually laymen) "engaged in the often competitive enterprise of ferreting out crime," is wholly unjustifiable.

After the decision of the United States Court of Appeals in this matter, this Court for the first time intimated in an *obiter dictum* that a state district attorney does not qualify as a "neutral and detached magistrate" for the purpose of issuing a *search warrant*. (Wisconsin has never authorized its district attorneys to issue search warrants—only warrants of arrest.) Actually, the district attorney had not issued a search warrant, but a subpoena *duces tecum*, which could in no event qualify as a search warrant or justify a search for the articles ordered to be produced. *Mancusi v. De Forte*, (6/17/68) 88 S. Ct. 2120, 2125.

District attorneys were initially authorized to issue warrants of arrest by chapter 558, Wis. Laws 1945. Because district attorneys normally were the ones who decided whether or not a warrant would issue and who drafted the complaints and warrants (as they still do) and the visit to a magistrate's office was but a useless, time-consuming, and (because justices of the peace received a fee for their "services" in swearing complainants and issuing warrants which had already been prepared for them) often an expensive formality, and because it would

often happen in the rural areas that no magistrate was available and complainants had to be told to return on another day, it seemed reasonable to vest in the district attorneys the authority to issue the warrants themselves and to take the oaths of complainants.

However, the legislature did not intend to vest district attorneys with the full powers of magistrates, including issuance of search warrants, conducting of preliminary examinations, and conducting John Doe hearings, so it was provided that they "are not magistrates and their authority to issue such process is limited to that prescribed in section 361.02 (2) [now 954.02]." It was a sensible, practical, and convenient law, and it went unchallenged on constitutional grounds for 20 years.

II. *STATE EX REL. WHITE v. SIMPSON,* (1965) 28 WIS. 2D 590, 137 N. W. 2D 391, SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

After 20 years of district attorneys' warrants of arrest, the Wisconsin Supreme Court held on Federal constitutional grounds that district attorneys were not "the equivalent of a neutral and detached magistrate who may constitutionally be empowered to authorize the issuance of the warrant." *State ex rel. White v. Simpson*, 28 Wis. 2d 590, 597-598, 137 N. W. 2d 391. *White* was not a criminal case, but a civil paternity proceeding, and the warrant was actually issued by the deputy clerk of court upon authorization of an assistant corporation counsel.

Later, the court held that, on collateral attacks upon convictions, the *White* rule would not be retroactively ap-

plied to cases finalized before it was announced, even if the point had been timely raised. *State ex rel. La Follette v. Raskin,* (1966) 30 Wis. 2d 39, 55, 139 N. W. 2d 667.

Then the court in the state predecessor of this case, *State ex rel. Schmear v. Gagnon,* (1967) 35 Wis. 2d 447, 151 N. W. 2d 20 (R. 43-47), declined to give retroactive effect to the *White* case to exclude evidence. Its decision on that point was well grounded in federal law.

The arrest of the petitioner pursuant to the district attorney's warrant was not an arrogant police action in flagrant violation of petitioner's rights. Who was the policeman that he should question process issued by the district attorney which the lawyers considered proper procedure?

In holding that the rule of *Mapp v. Ohio,* (1961) 367 U. S. 643, 6 L. ed. 2d 1081, 81 S. Ct. 1684, 84 A. L. R. 2d 933, should not be retroactively applied in view of the fact that it overruled an earlier case which had been relied on, *Wolf v. Colorado,* (1949) 338 U. S. 25, 93 L. ed. 1782, 69 S. Ct. 1359, this Court said in part:

> "We believe that the existence of the Wolf doctrine prior to Mapp is 'an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' Chicot County Drainage Dist. v Baxter State Bank, supra, 308 US at 374, 84 L ed at 332. The thousands of cases that were finally decided on Wolf cannot be obliterated. The 'particular conduct, private and official,' must be considered. Here 'prior determinations deemed to have finality and acted upon accordingly' have 'become vested.' And finally, 'public policy in the light of the nature both of the . . . [Wolf doctrine] and of its previous application' must be given

its proper weight. Ibid. In short, we must look to the purpose of the Mapp rule; the reliance placed upon the Wolf doctrine; and the effect on the administration of justice of a retrospective application of Mapp.

"* * *

"It is true that both the accused and the States relied upon Wolf. Indeed, Wolf and Irvine each pointed the way for the victims of illegal searches to seek reparation for the violation of their privacy. Some pursued the same. See Monroe v Pape, 365 US 167, 5 L ed 2d 492, 81 S Ct 473 (1961). In addition, in Irvine, a flag in a concurring opinion warned that Wolf was in stormy weather. On the other hand, the States relied on Wolf and followed its command. Final judgments of conviction were entered prior to Mapp. Again and again this Court refused to reconsider Wolf and gave its implicit approval to hundreds of cases in their application of its rule. In rejecting the Wolf doctrine as to the exclusionary rule the purpose was to deter the lawless action of the police and to effectively enforce the Fourth Amendment. That purpose will not at this late date be served by the wholesale release of the guilty victims.

"Finally, there are interests in the administration of justice and the integrity of the judicial process to consider. To make the rule of Mapp retrospective would tax the administration of justice to the utmost. Hearings would have to be held on the excludability of evidence long since destroyed, misplaced or deteriorated. If it is excluded, the witnesses available at the time of the original trial will not be available or if located their memory will be dimmed. To thus legitimate such an extraordinary procedural weapon that has no bearing on guilt would seriously disrupt the administration of justice." *Linkletter v. Walker,* (1965) 381 U. S. 618, 14 L. ed. 2d 601, 85 S. Ct. 1731.

See also, *Tehan v. Shott*, (1966) 382 U. S. 406, 15 L. ed. 2d 453, 86 S. Ct. 459, in which this Court held that its decision applying the Fifth Amendment privilege against compulsory self-incrimination would not be retroactively applied.

Finally, in *Johnson v. New Jersey*, (1966) 384 U .S. 719, 16 L. ed. 2d 882, 889-891, 86 S. Ct. 1772, this Court held that the *Miranda* and *Escobedo* cases would not apply to trials which commenced before the respective dates on which they were decided. In its decision on retroactivity of new rules of constitutional law, this Court said in part:

> "We here stress that the choice between retroactivity and nonretroactivity in no way turns on the value of the constitutional guarantee involved. * * *
>
> "We also stress that the retroactivity or nonretroactivity of a rule is not automatically determined by the provision of the Constitution on which the dictate is based. Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice, and the way in which these factors combine must inevitably vary with the dictate involved. * * *
>
> "Finally, we emphasize that the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to Jackson v Denno, supra, because confessions are likely to be highly persuasive with a jury, and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to Griffin v California, supra, despite the fact that comment on the failure to testify

may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth-determining process at trial. .

"* * *

"At the same time, retroactive application of Escobedo and Miranda would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards. * * *"

It is submitted that the same considerations which apply to the question of retroactivity of the *Mapp* case and the Fifth Amendment cases apply here. Prior to the Wisconsin court's decision in *White,* many, many, warrants were issued by district attorneys and executed in all good faith by police officers. No doubt a large number of these resulted in searches incidental to the arrests which produced evidence which was received at the defendants' trials. To apply the *White* case retroactively for the purpose of upsetting convictions in such cases would not be in the interest of the administration of justice.

It is therefore respectfully submitted that, there being no substantial federal question involved, the writ of certiorari should be denied.

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